ZAKIAH ABU MANSOR

v.

SAMSURI WELCH ABDULLAH

HIGH COURT MALAYA, SHAH ALAM
ABDUL WAHAB PATAIL J
[37-23-97]
13 JULY 1998

CIVIL PROCEDURE: *Affidavits - Affidavits-in-support of application - Whether complied with O. 41 rr. 1(4) & 9(2) Rules of the High Court 1980 - Whether non-compliance curable - Rules of the High Court 1980, O. 2 r. 1*

LEGAL PROFESSION: *Practice of law - Practice and etiquette - Affidavits-in-support of application affirmed by solicitor handling case - Whether contrary to r. 28 Legal Profession (Practice and Etiquette) Rules 1976*

The plaintiff applied for an order of committal against the defendant because the defendant had refused to obey a court order obtained by the plaintiff ordering the defendant to vacate from certain premises. Before the application could be heard, the defendant raised the following preliminary objections: (i) that the affidavits-in-support of the application did not comply with O. 41 rr. 1(4) and 9(2) of the Rules of the High Court 1980 ('RHC') and (ii) that the affidavits were affirmed by the solicitor handling the case contrary to r. 28 of the Legal Profession (Practice and Etiquette) Rules 1976.

Held:

[1] The purpose of r. 28 of the Legal Profession (Practice and Etiquette) Rules 1976 is to ensure that solicitors acting in a matter do not appear as witnesses since doing so may compromise their value as a solicitor or as a witness. The practice of a solicitor swearing an affidavit and continuing as solicitor is best avoided. Defective affidavits sworn by a solicitor, who is an officer of the court, is unseemly and wholly incompetent.

[2] The affidavits by the solicitor gave the legal firm's business address. If the solicitor chooses to wear the mantle of a witness and swear an affidavit, he must give his residential address in accordance with O. 41 r. 1(4) of the RHC.

[3] Order 2 r. 1 of the RHC entrusts the court with the discretion to allow justice for the parties to be achieved where there is non-compliance with the rules. The order is not intended for the protection of the counsel, for then there will be no incentive to learn to comply with the Rules of the High Court.

[4] The plaintiff purchased the property at a public auction and obtained an order against the defendant to vacate the premises. The defendant refused to obey the court order when the bailiff went to the premises. A court order must always be obeyed unless it is set aside or stayed.

[5] If the plaintiff were prevented by the defective documents from obtaining justice, a miscarriage of justice may result. The justice of the case suggests that the plaintiff ought not to be barred on this ground alone and that an opportunity ought to be given for the merits to be heard.

[Preliminary objections dismissed; affidavits to be re-sworn and re-filed; costs relating to preliminary objections to be paid by solicitor.]

Case(s) referred to:

Amanah International Finance Bhd v. Thian Juk Cheung & Ors (Suit No KG 392/1986) ***(refd)***

Dato' Wong Gek Meng v. Pathmanathan Mylvaganam & Ors [1998] 1 CLJ 625 ***(refd)***

Kasnen Kandasamy v. Menteri Sumber Manusia Malaysia & Anor (OS No R3-25-151-96) ***(refd)***

Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors [1985] 1 CLJ 18 ***(refd)***

Voon Mow Chen v. Menteri Dalam Negeri & Anor & Other Cases [1993] 4 CLJ 195 ***(refd)***

Seng Huat Hang Sdn Bhd v. Chee Seng & Co Sdn Bhd [1985] 2 CLJ 97 ***(refd)***

Legislation referred to:

Legal Profession (Practice and Etiquette) Rules 1976, r. 28

Rules of the High Court 1980, O. 2 r. 2(1), O. 3 r. 5(1), (2), O. 31 rr. 4, 7(1), O. 41 rr. 1(4), 4, 9(2)

Other source(s) referred to:

Mallals Digest Civil Procedure, p 97

For the plaintiff - Amrit Pal (Pritam Singh Doal with him); M/s Pritam Singh Doal & Co

For the defendant - K Ganesh; M/s K Ganesh & Assocs

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:

The plaintiff has applied by this notice of motion filed on 18 March 1998 for the following orders:

1. Leave under O. 3 r. 5(1) and (2) of the Rules of the High Court 1980 to file this application.

2. An order of committal against the defendant, Samsuri Welch Abdullah @ Samuel Ponniah Welch.

3. Costs to be paid by defendant.

The notice of motion is supported by the affidavit at encl. 13 affirmed on 17 March 1998, of one Pritam Singh Doal, an advocate and solicitor acting for the plaintiff.

It is in respect of the affidavits relating to and in support of the notice of motion that the defendant now raises preliminary objections. Notice of preliminary objections had been given to the plaintiff's counsel on 1 July 1998 being two days earlier.

The first objection is that the jurat of the affidavit of Pritam Singh Doal of 17 March 1998 began and ended on a page separate from the affidavit itself.

The second objection is in respect of the supporting affidavit shown in exh. PSD-15 in encl. 19. Enclosure 19 is another affidavit affirmed on 28 May 1998 by the same Pritam Singh Doal. Exhibit PSD-15 is an *ex parte* summons in chambers seeking leave to commence committal proceedings, supported by the affidavit of the same Pritam Singh Doal affirmed on 12 January 1998. The objection is that it failed to comply with O. 41 r. 9(2) of the Rules of the High Court 1980 which provides:

> Every affidavit must be endorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so endorsed may not be filed or used without the leave of the Court.

This objection applied also to the affidavit at encl. 13 and 23. In encl. 13 Pritam Singh Doal had stated:

AFFIDAVIT

> Saya Pritam Singh Doal (KP No 520521-10-5609) yang telah cukup umur dan yang beralamat di No 1084, Tingkat 2, Jalan Sentul, 51000 Kuala Lumpur dengan sesungguhnya berikrar dan menyatakan seperti berikut:
>
> 1. Saya adalah Peguambela yang mengendalikan kes ini untuk Plaintif.
>
> 2. Fakta-fakta yang dinyatakan adalah benar sepanjang pengetahuan saya sendiri dan juga didapati dari rekod-rekod dan dokumen-dokumen di mana saya mempunyai akses sehingga sebaliknya dinyatakan.

In encl. 23 Pritam Singh Doal had stated:

AFFIDAVIT JAWAPAN KEPADA

BALASAN KEDUA

Saya Pritam Singh Doal (KP No 520521-10-5609) yang telah cukup umur dan yang beralamat di No 1084, Tingkat 2, Jalan Sentul, 51000 Kuala Lumpur dengan sesungguhnya berikrar dan menyatakan seperti berikut:

1. Saya memohon keizinan Mahkamah yang mulia ini untuk merujuk kepada Affidavit Balasan Kedua oleh Respondan (sic) yang telah diikrar pada 16hb Jun 1998.

2. Saya merujuk kepada perenggan 4 ...

The third objection is that encls. 13, 19, and 23, all being the affidavit of the same Pritam Singh Doal sworn on 17 March, 28 May and 19 June 1998 respectively were in breach of O. 41 r. 1(4) which provides:

> Every affidavit must be expressed in the first person and must state the place of residence of the deponent and his occupation or, if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state the fact.

The fourth objection is based on r. 28 of the Legal Profession (Practice and Etiquette) Rules 1976 which provides:

> (a) An advocate and solicitor shall not appear in court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardizing his clients interests.
>
> (b) ...
>
> (c) This rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal and undisputed facts in matters in which he acts or appears.

The First And Second Objections

On a similar objection that the jurat of an affidavit began and ended on a fresh page of paper, and did not follow immediately after the end of the deposition, Nik Hashim JC (as he then was) in *Kasnen a/l Kandasamy v. Menteri Sumber Manusia Malaysia & Anor* OS No R3-25-151-96, *Mallals Digest Civil Procedure* at s. 250 p. 97, rejected the affidavit as defective and could not be cured. In *Amanah International Finance Bhd v. Thian Juk Cheung & Ors Suit No KG 392/1986,* Haidar J held that the affidavit was defective where the jurat of the affidavit ended on a fresh page and did not follow

immediately after the end of the deposition. His Lordship held that the irregularity of the jurat could not be waived by the parties and the irregular affidavit could not be taken to support the application unless leave was applied for under O. 31 rr. 4 and 7(1). The same conclusions was arrived at in *Voon Mow Chen v. Menteri Dalam Negeri & Anor and Five Other Cases* [1993] 4 CLJ 195.

The plaintiff replied that the defendant is estopped under O. 2 r. 2(1) since the objection was not raised within reasonable time and before the party applying has taken in fresh step after becoming aware of the irregularity. It was argued that in the event that the plaintiff is not estopped under the foregoing rule, then the defendant applies under O. 41 r. 4 so that the affidavit may be accepted. It was submitted for the plaintiff that the committal proceeding is to protect the integrity and due administration of the court and not merely one of the plaintiff taking a complaint to the court. The irregularity, it was submitted, is one of form and is not fundamental. Counsel submitted:

> Hujah Defendan di-estop daripada membawa bantahan ini. Jika dibawa awal lagi kami boleh memohon leave of Court untuk memfailkan affidavit. Isu ini adalah form, bukan fundamental.

The same argument was advanced by the plaintiff with regard to the second objection as to the failure to state on whose behalf the affidavit was filed.

Counsel for the plaintiff then proceeded to submit on r. 28 of the *Legal Profession (Practice and Etiquette) Rules 1976*, the subject of the fourth objection. I would assume that the same ground is raised for the other affidavits objected to.

Rule 28 of the Legal Profession (Practice and Etiquette) Rules 1976, provides:

> 28. Advocate and solicitor not to appear in a cam where he is a witness.
>
> (a) An advocate and solicitor shall not appear in Court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.
>
> (b) An advocate and solicitor shall not appear before an appellate tribunal if in the case under appeal he has been a witness on a material and disputed question of fact in the Court below.
>
> (c) This rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts in matters in which he acts or appears.

29. Advocate and solicitor not to testify on behalf of client.

Except when essential to the ends of justice or as to merely formal matters, an advocate and solicitor appearing in any cause shall not testify in Court on behalf of his client only in that cause.

Normally, in respect of matters where disputed questions of facts are involved, it is for the parties and not their solicitors to affirm affidavits relating thereto: *Seng Huat Hang Sdn Bhd v. Chee Seng & Co Sdn Bhd* [1985] 2 CLJ 97; [1986] MLJ 348; *Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors* [1985] 1 CLJ 181; [1986] 1 MLJ 315. The purpose is to ensure that the court and the parties have access to the evidence of the persons having first hand knowledge of events and therefore are the best witnesses to give evidence. The purpose of r. 28 is to ensure that solicitors acting in a matter do not appear as witnesses since doing so may compromise their value as solicitor or as a witness. The solicitor must be mindful of his duty to the court: *Dato' Wong Gek Meng v. Pathmanathan Mylvaganam & Ors* [1998] 1 CLJ 625.

The special position of advocates and solicitors before the courts must not be tainted with trading that position as a witness. It must be borne in mind whilst a solicitor can be no more than an ordinary witness, his value, in the eyes of all, as a solicitor is diminished in the case where he appears as a witness. Thus the practice of a solicitor swearing an affidavit and continuing as solicitor is best avoided. I note that the affidavits by the solicitor gave the legal firm's business address. If the solicitor chooses to wear the mantle of a witness and swears an affidavit, he must give his residential address in accordance with O. 41 r. 1(4) of the Rules of the High Court 1980.

The result of not adhering to the Rule is well apparent in this case. With the loss of that detachment so essential for good legal advice, basic errors emerge, causing unnecessary burden on the client's case. That should not happen. The result however is that because of purely formal errors in the solicitor's affidavit, the client's application may not be able to be heard.

Order 2 of the Rules of the High Court 1980, makes provision to some measure to protect parties from such circumstances. The order provides:

1 Non-compliance with rules (O. 2 r. 1)

(1) where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

2 Application to set aside for irregularity (O. 2 r. 2)

(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.

The order entrusts the court discretion, subject to orders as to cost or otherwise, to allow justice for the parties to be achieved. The order is however not intended for the protection of counsel, for then there will be no incentive to learn, comply with the Rules of the High Court. The Rules of the High Court is intended to bring order to the conduct of proceedings. Ignoring it will bring the registry and conduct of proceedings down to a state of chaos, and open the doors of legal practice to incompetents.

The plaintiff in this case had purchased the property at a public auction. The plaintiff had obtained an order against the defendant to vacate the premises. The bailiff, it is alleged had gone to the premises. The defendant refused to obey the court order. A court order must always be obeyed unless it is set aside or stayed.

If the plaintiff were prevented by the defective documents from obtaining justice, a miscarriage of justice may result. The justice of the case suggests the plaintiff ought not be barred on this ground alone, and an opportunity ought to be given for the merits to be heard.

For the above reasons I would dismiss the preliminary objections. However defective affidavits by a solicitor, who must remember he is an officer of the court, is unseemly and wholly incompetent. I would order the offending affidavits to be re-sworn and re-filed, correcting all defects in form, and that the solicitor shall pay for the costs relating to the preliminary objections.

I would dismiss the plaintiff's objections to the defendant's affidavit filed out of time in view of the above that I would hear the merits of the plaintiff's application by having their affidavits re-sworn and re-filed.